United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2081

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To be argued by
I. STEPHEN RABIN

P/S

United States Court of Appeals

For the Second Circuit

ROBERT L. SCHWARTZ, RICHARD F. KNAPP, RUDOLPH J. MUELLER, LAWRENCE F. McGIVNEY, SIDNEY J. HELLER, GARBIS G. TAKESSIAN, NORBERT W. DOYLE, STANLEY F. POPEIL, WILLIAM E. LANGE, E. LEE MULLER, ROBERT E. McDONNELL, III and JOHN F. SWAN,

Plaintiffs-Appellants,

—against—

McDONNELL & CO., INCORPORATED, T. MURRAY McDONNEL, MORGAN McDONNELL, EDWARD F. BECKER, FRANK V. DEEGAN, WILLIAM J. CORBETT, RAYMOND J. DOYLE, JR., HUBERT McDONNELL, JR., JOHN J. DELLASSANDRO II, and NEW YORK STOCK EXCHANGE, INC.,

Defendants-Appellees.

ON APPEAL FROM A JUDGMENT AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK
(71 Civ. 1281)

BRIEF FOR PLAINTIFFS-APPELLANTS

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BRIEF FOR PLAINTIFFS-APPELLANTS

Statement of Issues Presented For Review

1. When plaintiffs' counsel mistakenly believes that a magistrate's pre-trial conference has been adjourned, and he fails to attend, may his clients' cause be dismissed with prejudice, thereby extinguishing their claims without a hearing on the merits?

2. When the leading case in this Circuit, almost identical in its facts to the present case, requires that this case

not be dismissed, may a District Judge disregard that case?

3. May the error of another attorney, who earlier represented the plaintiffs, be attributed to plaintiffs' present counsel and be a basis for dismissal of plaintiffs' claim with prejudice?

4. May a District Judge disregard a stipulation as to joint discovery, disregard Rule 32, and disregard the rules of evidence and hold that relevant statements made in other proceedings are not admissible in this case?

Statement of the Case

The Nature of the Case and Proceedings to Date

This is a lawsuit brought by twelve purchasers of the common stock of McDonnell & Co., Inc. ("McDonnell"), a former member of the New York Stock Exchange (the "Exchange"). The plaintiffs purchased their stock from October, 1968 to January, 1969 pursuant to representations made to them that McDonnell was making huge profits, and pursuant to grossly false financial statements of McDonnell, which in fact was desperately trying to raise capital. Barely nine months later McDonnell was insolvent and its shareholders were told that their stock was worthless. The plaintiffs lost the entire amount they invested, $170,400 exclusive of interest; they brought this action under the Federal securities laws to recover.

While the suit was being actively litigated, and after plaintiffs had completed discovery and were ready to go to trial, District Judge Pierce entered an order, *sua sponte* and without a hearing, dismissing the suit for lack of prosecution and for failure to attend a Magistrate's conference. The conference was scheduled six months earlier so the parties could "report on the progress of discovery" (186a).

The conference was held on May 17, 1974 without the plaintiffs being represented. The Magistrate had previously ordered that plaintiffs complete their discovery by May 20, 1974, and they had not at any time notified the Magistrate that they would not be able to meet this deadline. In fact the deadline had been met.

When plaintiffs' attorneys failed to appear at the conference, the Magistrate, that same day, filed a written report with Judge Pierce recommending that the case be dismissed with prejudice.

At the time of the dismissal, July 1, 1974, there were pending four motions for partial summary judgment brought by various defendants, and a motion to amend an answer (171a-174a; 175a), all of which were being strenuously resisted by the plaintiffs.

Plaintiffs' attorney freely admitted, in a sworn statement, that he failed to attend the conference because he was under the belief that it was adjourned pending decisions of the motions.* The conference date had been set by the Magistrate on November 21, 1973, before one of the foregoing motions had been made. Neither the Court nor the Magistrate had ever intimated that the May 17, 1974 meeting was to take place notwithstanding the fact that the motions were not decided.

In any event, plaintiffs had completed their discovery by May 17, 1974, and thus had complied with the discovery deadline. Pursuant to Rule 34 they had obtained approximately 3,200 documents from McDonnell (in re-

* As a result of the dismissal, the five motions were never decided by the District Court. The motions were made from six to eight months before the dismissal, on October 31, 1973 (one motion for partial summary judgment), and November 7, 1973 (three motions for partial summary judgment), and December 10, 1973 (motion to amend answer) (171a-174a; 181a).

ceivership) and the Exchange, many of which clearly indicated that the Senior Management Board of McDonnell, of which several of the individual defendants were members, willfully concurred in this unregistered offering of securities after McDonnell's counsel advised the Board that the Securities Act of 1933 required registration (164a).

The documents also indicated that the Senior Management Board knew false financial information was being given to offerees, and that the Exchange had good reason to know the foregoing was occurring and may well have had actual knowledge (165a-166a). The Exchange has the duty under the Securities Exchange Act of 1934 and its own constitution and rules to regulate the activities of member firms; its laxity in its surveillance of McDonnell at this time, when it knew of the firm's desperate need for capital, was apparently in the hope it could avert the crash of McDonnell, then one of the largest brokerage houses on Wall Street.

The Course of Discovery Proceedings

In addition to the documents obtained pursuant to Rule 34, between the November 21, 1973 and May 17, 1974 conferences the plaintiffs had made available to them over forty-two transcripts of depositions taken earlier in two litigations, also pending in the Southern District, in which the Exchange was a defendant (in one of these McDonnell also was a defendant).* In both, the plaintiffs were represented by the same New York City firm, Davis & Cox. These suits also involved fraudulent misrepresentations as to the true financial condition of McDonnell at the time it was trying

* The two litigations are *Margaret Mary McDonnell Murphy* v. *McDonnell & Co. et al.*, 71 Civ. 461, and *Anna M. McDonnell, et al.* v. *The New York Stock Exchange, et al.*, 71 Civ. 1940.

to raise capital in late 1968, and also involved the failure of the Exchange to regulate McDonnell properly.

Pursuant to a stipulation entered into early in this litigation, the plaintiffs in the two related litigations, the Exchange, McDonnell, and the present plaintiffs agreed to coordinate all discovery to avoid duplication (35a). The stipulation provided that depositions taken in any one of the three suits would be deemed taken in all, that documents produced pursuant to Rule 34 in any one of the suits would be deemed produced as to all, and, finally, that

> "The undersigned shall enter into such other and further agreements and stipulations as may be appropriate from time to time to effectuate the foregoing."

Davis & Cox, in the two related litigations, had deposed 23 persons, at 42 separate deposition sessions, who are either included among the defendants in this case or were deposed as representatives of the defendants. The persons deposed included senior vice presidents of the Exchange, the senior accountant of the Exchange, Exchange investigators who had investigated McDonnell prior to its collapse and who had learned of its true condition, and T. Murray McDonnell and Morgan McDonnell, individual defendants in this case. As late as July 21, 1974 the defendant Exchange was being ordered to produce further documents by Judge Ryan.

The plaintiffs herein intended to save the time and expense of retaking these depositions by using at the trial, in accordance with the stipulation and the applicable rules of evidence, the depositions taken in the two Davis & Cox cases and had stated this intention to the Magistrate

at a conference held on October 4, 1973 (204a). Thus, by the May 17, 1974 date the plaintiffs had no further need for more discovery and were ready to proceed to trial. On the other hand, no defendant in this case had conducted any discovery whatsoever.

In addition to the plaintiffs' intention to use the foregoing discovery materials, the attorneys for the plaintiffs, the firm of Rabin & Silverman, had prosecuted a similar claim against McDonnell and individual defendants Becker, Corbett, Dallessandro, Doyle, Hubert McDonnell, Jr., Morgan McDonnell and T. Murray McDonnell, in an arbitration before the American Stock Exchange.* Rabin & Silverman had available the entire transcript of the arbitration, and intended to use the transcript at the trial of the present case.

Retention of Present Counsel for Plaintiffs

A year and seven months before the dismissal, when plaintiffs were represented by another attorney, that attorney had missed a calendar call due, apparently, to a change in his office address and the failure to forward his mail. Without the attorney being notified Judge Pierce dismissed the case. Plaintiffs moved to vacate the dismissal as soon as they learned of it a month later, and the motion was granted, defendants' attorneys fees being personally taxed against the former attorney. The motion papers were endorsed with an order referring the case to Magistrate Raby for the preparation of a rigid discovery schedule.

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* *In the Matter of James C. Cohig, et al. v. McDonnell & Co. Incorporated, et al.* (Oct. 4, 1972-May 30, 1973)

Subsequently the plaintiffs changed their attorneys to Rabin & Silverman, which is prosecuting this appeal.*

The Magistrate's Report And The Court's Opinion

One must look both to the Magistrate's Report of May 17, 1974 and the Opinion of District Judge Pierce, filed July 1, 1974 (entitled "Memorandum and Order"), in order to understand completely the assumptions and reasoning upon which this dismissal was based. The Opinion adopted the Report, and in it the District Judge gave additional reasons for dismissing the case.

The Magistrate's Report

The Magistrate's Report, in essence, set forth the following statements as the bases for recommending that the case be dismissed (185a-187a):

1. That in his report of November 21, 1973 he directed "that counsel appear at a conference at my office on May 17, 1974 for a report on the progress of discovery. . . ."

2. That plaintiffs' counsel failed to appear at the May 17, 1974 conference.

3. That at the May 17, 1974 conference

> "I was advised by counsel for the defendants that the plaintiffs had not even commenced discovery. . . ."

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* The first attorney, Donald M. Kresge, is now associated with Rabin & Silverman. He became associated with the firm on July 1, 1974. Prior thereto he was not affiliated with the firm, and he had nothing to do with this litigation at the time of the May 17, 1974 conference.

4. That

> ". . . it is obvious that the plaintiffs cannot possibly complete by May 20, 1974 the discovery which they had not even commenced as of today May 17, 1974, . . ."

The Magistrate in the Report recommended to the District Judge that the action be dismissed with prejudice pursuant to Fed. R. Civ. P. 41(b) for failure to prosecute, and Fed. R. Civ. P. 16 for faliure to attend a pre-trial conference.

The Court's Opinion

Since the District Judge's Opinion adopted the May 17 Report of the Magistrate, the erroneous assumptions and conclusions of the Magistrate must be considered part of the Opinion.

Accordingly, the incorrect information given to the Magistrate by defendants' counsel, that plaintiffs had not even commenced discovery (item 3 above), is necessarily engrafted onto the Opinion. Likewise, the Magistrate's conclusion that the plaintiffs could not complete their discovery by May 20, 1974 (item 4 above) is made part of the Opinion. Both items are assumptions that are so vital to the Opinion that, without them, the Opinion loses all its persuasiveness.

It should further be noted that the District Judge dismissed this litigation without having been present at any of the several pre-trial conferences held in the case, and without a hearing. Yet the District Judge concluded that the sworn explanation given by Frank Greenberg, the member of Rabin & Silverman who was in charge of the case,

for missing the Magistrate's conference was not credible and "defies reason" (240a).

Furthermore, the District Judge also took the direction of plaintiffs' lawsuit out of the hands of their chosen counsel by holding that notwithstanding counsel's determination that no further discovery was needed, this determination was a "conjured up" assertion "to excuse yet another failure to actively pursue this litigation" (240a).

Based on these conclusions, which entirely lack support, the Court imposed the most severe of all sanctions on the plaintiffs. Yet notwithstanding what would appear to be, from the Opinion, egregious conduct by plaintiffs' attorneys, no sanctions were imposed on them.

The text of the Opinion is five pages in length, to which are appended one and a half pages of single spaced footnotes. The footnotes contain much of the intellectual underpining of the Opinion and must be read together with the text.

On July 8, 1974 the District Judge, apparently *sua sponte*, filed an Amendment to the Opinion that revised a footnote heavily relied on in the Opinion's text. Although the Amendment stated that it did not effect the persuasiveness of the Opinion, as shown below it further weakened the premises on which the dismissal order was based.

Affidavits Submitted After The Magistrate's Report

After the Magistrate forwarded his Report to the District Judge, and notified plaintiffs' counsel that they had missed the conference by mailing them a copy of the Report, counsel for both sides submitted affidavits to the District Judge in support of, and in opposition to, the adoption of the Report (189a-226a).

Thus the District Judge, before rendering his opinion, had before him the Report, five affidavits in support of its adoption, and two opposing affidavits submitted by Mr. Greenberg, the attorney who had missed the conference.

The District Judge rendered his decision entirely on papers, without a hearing of any kind.

The Magistrate's Report and The Court's Opinion Analyzed

The Alleged Failure to Comply With the Magistrate's Discovery Schedule

The District Court, in its Opinion, adopted the Magistrate's recommendation that the action be dismissed with prejudice "for failure of plaintiffs' counsel to adhere to the strict discovery schedule of the Magistrate" and "for failure of plaintiffs' counsel to appear at a conference scheduled before the Magistrate on May 17, 1974" (237a).

Thus, by incorporating the premise of the Magistrate that plaintiffs' discovery was not complete by May 17, the Court was incorporating the misleading information given to the Magistrate by defendants' counsel at the May 17 meeting.

The Court was also disregarding the sworn statements of plaintiffs' counsel as to plaintiffs' lack of need for further discovery, submitted to the Court in the affidavits submitted in opposition to the adoption of the Report.

The Report and the Opinion neglected to mention that the sole purpose of the conference was merely to inform the Magistrate that plaintiffs' obligation to complete discovery by May 20, 1974 had been met. No pretrial order or other pretrial papers were to be submitted at the conference (defendants still had six months to conduct their

still uncommenced discovery). The purpose of the conference could have been accomplished by a brief telephone call.

The District Judge Ignored Judge Stewart's Finding that Plaintiffs Were Not To Blame for the Earlier Dismissal

When plaintiffs' prior counsel missed the review calendar call seventeen months before the May 17, 1974 Magistrate's conference, plaintiffs did all they could be expected to do in their efforts to prosecute their claims: they took the case out of that attorney's hands and retained new counsel. Yet, as an additional reason for dismissing with prejudice, the District Judge cited the lapse of the prior attorney.

This, of course, ignored the fact that Judge Stewart's order that vacated the earlier dismissal specifically found it was the attorney, and not his clients, who was careless (170a). It also ignored the fact that the fees of defendants' counsel were charged to the attorney, not the plaintiffs.

The Court's Incorrect Holding that Depositions Taken in the Related Litigations Were Not Usable By the Plaintiffs

The plaintiffs' posture as to trial preparation, and their trial strategy, relied on the use of discovery conducted in the two related litigations being prosecuted by the Davis & Cox firm. The position of the plaintiffs, clearly stated to the Magistrate, and to the District Judge in plaintiffs' affidavits, was that they were entitled to make use of the fruits of the discovery conducted by Davis & Cox, as

well as their own discovery.* Furthermore, plaintiffs intended to use testimony taken at the *Cohig* arbitration.

The Court adopted the incorrect contentions of the defendants, made in defendants' affidavits to affirm the Magistrate's Report, that the depositions would not be admissible in this action. This holding not only disregards the intention of Fed. R. Civ. P. 32, but it disregards the fact that out-of-court statements in whatever form are admissible, subject to their being relevant and to their qualifying under an exception to the hearsay rule. This will be more fully discussed below.

The Court's holding also, of course, completely disregarded the discovery stipulation entered into with respect to this litigation and the two Davis & Cox litigations. The Court, without any citation of authority, held (243a fn. 3) that the stipulation was not in effect when the case was off the calendar after the January 30, 1973 dismissal. The Court also ignored the express language of the stipulation and its requirement that the parties to it had to enter into further agreements and stipulations to effectuate the intention of the stipulation.

Given all of the foregoing, and the draconian severity of the sanction imposed, one might be inclined to explain the dismissal as the response of a District Judge to an imagined insult. Such an explanation has a basis in the language of the Opinion.

Notwithstanding Mr. Greenberg's sincere and profuse apologies for missing the May 17, 1974 conference, ten-

* In addition to documents that plaintiffs obtained from defendants pursuant to Fed. R. Civ. P. 34, the plaintiffs had also, by informal request made to the Securities and Exchange Commission, obtained many of the documents that the Commission used in its investigation of the collapse of McDonnell. They intended to use these documents as well at the trial.

dered personally and in sworn statements (202a-236a), the Court found that he "had little regard for the Court's and the Magistrate's authority" (241a). And to add a tragi-comic touch, in his distress and haste to explain his behavior when he learned of the dismissal, Mr. Greenberg submitted a reply affidavit that he failed to have notarized.

In the State of New York, such an unnotarized attorney's affirmation is just as good as an affidavit*, but the District Judge seized upon this omission and gave it as an additional reason for the dismissal (243a fn. 4).

Of course, in calmer moments if the reply affidavit were so defective that in good conscience it should not have been considered by the Court, it simply would have been ignored, with no probative weight being given to the statements it contained.

Parenthetically, it should be noted that the Court misread the docket sheet when it composed its Opinion. Blindly relying on an untrue assertion made by defendants, the Court cited as evidence of "little or any serious intention to prosecute the action" (242a) that only sixteen defendants, of fifty-two named in the caption of the complaint, had been served. In fact, by stipulation forty-two named defendants had been dismissed as parties earlier, and the stipulation was among the documents filed in the record (R 60).

Later, on July 8, 1974, the Court amended the Opinion to reflect the true facts, but nevertheless stated in the amendment that the reasoning of the Court was unweakened by the change (245a).

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* New York CPLR Rule 2106.

POINT I

This dismissal is contrary to the controlling law in this and other circuits.

A. *Welden* v. *Grace Line, Inc.* States The Controlling Law in this Circuit, And It Was Completely Disregarded By The District Judge.

The decision of the District Judge was entirely contrary to the controlling law in this Circuit. In *Welden* v. *Grace Line, Inc.*, 404 F. 2d 76 (2d Cir. 1968), the facts almost exactly paralleled the facts in this case. Plaintiffs' attorney missed two pre-trial conferences. There had been a turnover of lawyers at the office of one of plaintiffs' attorneys, and a new attorney on the case had never been informed that a pre-trial conference had been scheduled. In addition, new trial counsel had never filed a notice of substitution of attorneys, and notices of the pretrial conferences apparently were sent to the wrong address.

This Court, per Chief Judge Lumbard, vacated the order of the District Judge, who had dismissed plaintiffs' case. Chief Judge Lumbard stated, at 79-80:

> "Dooley's [the attorney who did not receive notice] account does not alter the fact that plaintiffs' counsel failed to check with the clerk of the court concerning the time of the May 18 conference. But it does provide substantial support for the view that the failure of plaintiffs' counsel to appear at the conference was the product of a good faith misunderstanding between attorneys Dooley and Hart as to the exact time set for the May 18 hearing and not an attempt on counsel's part to delay the proceedings or evade the orders of the court."

Accord: *Syracuse Broadcasting Corp.* v. *Newhouse*, 271 F.2d 910 (2d Cir. 1959).

B. Frank Greenberg's Mistake Was Not Willful, and Therefore Should Not Have Resulted In Dismissal

It is submitted that the facts in the present case are at least as compelling as the facts in *Welden*. One searches the record in vain for any piece of evidence that Mr. Greenberg acted willfully when he failed to attend the May 17 Magistrate's conference.

The one true fact that brightly shines through the incorrect assumptions and conclusions of the Magistrate and Court, based on misinformation deliberately supplied by the defendants, is that Mr. Greenberg made a technical, professional appraisal of the posture of the case, and he was wrong. He concluded that in accord with normal practice the conference was adjourned until important pending motions were decided, and he therefore missed the conference.

When Mr. Greenberg didn't appear on time, instead of a telephone call being made to his office at 80 Broad Street, a five minute cab ride from the Court House, the Magistrate, almost too zealously, immediately sent a report to the District Judge recommending dismissal. Certainly the resulting dismissal is out of keeping with the law as stated in *Welden*.

C. The Action of the District Judge Is Not Justifiable In Terms of Docket Control.

Welden is not an aberrant case, either in this or other Circuits. In *Peterson* v. *Term Taxi Inc.*, 429 F. 2d 888 (2d Cir. 1970), a plaintiff left town on the very date that the District Judge had set for trial, and the Judge, irked as was the District Judge here, dismissed the case for lack of prosecution. This Court stated at 891, in vacating the dismissal order:

> "Nevertheless, as we said in *Davis* [*Davis* v. *United Fruit Co.*, 402 F. 2d 328 (2d Cir. 1963)]

> 'a court must not let its zeal for a tidy calendar overcome its duty to do justice. 402 F. 2d at 331.'
>
> * * * *
>
> "We reiterate that the purpose behind close docket control is that of assuring that justice for all litigants be neither delayed nor impaired. The trial court's refusal here to reopen a case whose dismissal rested on plaintiff's poor judgment does not comport with those ends, and justice has been impaired by such close inflexible attention to the docket."

Other Circuits have likewise followed the principle that unless the conduct resulting in the dismissal was *willful* conduct, a party should not be penalized by being denied a trial on the merits. E.g., *United States* v. *Inter-American Shipping Corp.*, 455 F. 2d 938, 940 (5th Cir. 1972) ("Although discretionary, dismissal generally has been permitted only in the face of a clear record of delay or contumacious conduct by the plaintiff."); *Alamace Industries, Inc.* v. *Filene's*, 291 F. 2d 142 (1st Cir. 1961); *Renkin* v. *Shayne Brothers, Inc.*, 280 F. 2d 55 (D.C. Cir. 1960); *Jarva* v. *United States*, 280 F. 2d 892 (9th Cir. 1960).

D. *Link* v. *Wabash R. Co.* Is Not Authority For The Action of the District Court

Welden v. *Grace Line, Inc.* and *Peterson* v. *Term Taxi Inc.* were decided by this Circuit after the Supreme Court indicated the broadest limits of Rules 16 and 41(b) in *Link* v. *Wabash R. Co.*, 370 U.S. 626 (1962). In *Link*, counsel for one of the parties knew of a scheduled pre-trial conference but informed the Judge the day before that he would not attend because he had more important work to do elsewhere. There was no question that his missing the conference was willful, and the Supreme Court affirmed the

decision of the Seventh Circuit, which in turn had affirmed the District Judge's dismissal. The Court did not decide the question presented in this case—whether absent such an evident showing of willful nonattendance, dismissal would have been proper. See Note, 72 Yale L.J. 819 (1963).

Judge Waterman of this Circuit specifically addressed himself to the use of the sanction of dismissal, imposed at the pretrial phase of a lawsuit, in *An Appellate Judge's Approach When Reviewing District Court Sanctions Imposed for the Purpose of Incurring Compliance with Pretrial Orders*, 29 F.R.D. 420 (1962). He stated at 424-426:

> "The sanctions of dismissal and of judgment by default are severe sanctions, and appellate judges believe they would be remiss in their duties if they chose only to rubber stamp such orders of lower courts. To be sure, these drastic sanctions are indeed provided for by the Rules, but I am certain that the draftsmen did not propose that they should be used liberally in order to eliminate the actual trial of cases.
>
> "I suggest that appellate judges believe that a district judge should approach with hesitation the use by him of dismissal sanctions. Where an alternative, less drastic, sanction would be just as effective it should be utilized. For instance in United States v. Costello, 16 F.R.D. 428 (SDNY 1954), inasmuch as he believed that a default judgment would deprive Costello of U S. citizenship without a hearing, the trial judge would not enter judgment for the Government by default even though Costello had refused to answer questions put to him at his pre-trial proceedings. Instead, Costello was declared to be in contempt—and was fined. Our ap-

pellate court agreed, 222 F. 2d 656 (2 Cir. 1955), cert. denied, 350 U.S. 847, 76 S.Ct. 62, 100 L.Ed. 755 (1955), that the lower court action was proper and just.

* * * *

"Lyford v. Carter, 274 F. 2d 815 (2 Cir. 1960) (per curiam), and Syracuse Broadcasting Corp. v. Newhouse, 271 F. 2d 910 (2 Cir. 1959), are cases where district courts' dismissals pursuant to Rule 41(b) were held to be abuses of judicial discretion. In neither of these cases was the *power* of the distric court under Rule 41(b) questioned, but in both of them the appellate court questioned the exercise of that power under the circumstances there present. My own belief relative to the proper function of the appellate court where an attack has been made upon the breadth of exercise of lower court discretion was expressed by me in Syracuse Broadcasting Co. v. Newhouse, supra, at 915, as follows:

> 'Of course, in view of its intimate knowledge of the facts, discretion must be accorded the district court in its resolution of these administrative problems. This of necessity must be so, but when we are convinced that the court below has exceeded a proper discretion in that the order imposed was too strict or was unnecessary under the circumstances, we would be remiss in our duties if we did not set that order aside.' "

E. The District Court Erred When It Attributed the Lapse of Prior Counsel To the Firm of Rabin & Silverman

Nor was it proper for the District Judge to attribute the lapse of plaintiffs' prior counsel, in January, 1973, to

the plaintiffs' present attorneys. When a plaintiff learns that his attorney has erred and, to assure that his case will be diligently prosecuted, puts the case in the hands of new counsel, whatever may have been the sins of the first attorney, they should not be visited upon the second. *Korn* v. *Franchard Corporation*, 456 F. 2d 1206 (2d Cir. 1972). This is especially true in this case, where neither the first attorney to represent plaintiffs, nor Mr. Greenberg, were afforded a hearing. Id. at 1208; *Flaks* v. *Koegel*, 2d Cir., Docket No. 74-1437 (Sept. 25, 1974).

POINT II

The plaintiffs had the right to use discovery materials obtained in the other proceedings.

The District Court also erred when it based the dismissal on the proposition that discovery materials and testimony obtained in the other proceedings, involving the same issues, were inadmissible at the trial.

A. The District Court Ignored the Plain Meaning of the Stipulation's Language

First, there was the stipulation concerning this suit and the two suits being prosecuted by Davis & Cox. As already discussed, the Court ignored the plain meaning of the stipulation's language. It held that the stipulation was of little or no value to plaintiffs, and that the other parties to the stipulation, the Exchange and McDonnell, were not obligated to cooperate as to discovery, including, if necessary, to enter into new stipulations to give effect to the intentions expressed in the first one.

B. In this Circuit, the Depositions Would Have Been Admissible Under Rule 32.

Aside from the stipulation, in this Circuit the depositions would have been admissible under Fed. R. Civ. P.32

even though all the parties in the various proceedings were not the same. *Weyerhaeuser Co.* v. *Gershman*, 324 F. 2d 163, n. 1 (2d Cir. 1963). See also *Franzen* v. *E. I. Dupont de Nemours & Co.*, 146 F. 2d 837, 841-42 (3rd Cir. 1944). The language of Rule 32 as to prior dismissal of the other proceedings has not been adhered to restrictively by this Circuit, or by others. *Weyerhaeuser Co.* v. *Gershman*, supra, at 164 n. 1; *Ikerd* v. *Lapworth*, 435 F. 2d 197 (7th Cir. 1970); *Batelli* v. *Kagan & Gaines Co.*, 236 F. 2d 167, 169. See generally, 8 Wright & Miller, *Federal Practice and Procedure* § 2150 (1970).

C. The Depositions and Documents From the Other Proceedings were Admissible at the Trial Under Several Exceptions to the Hearsay Rule.

Aside from Rule 32, the testimony and documents obtained in the other proceedings, just as any other out-of-court statements, oral or written, would be admissible at the trial if they were relevant and qualified under any of the many exceptions to the hearsay rule. V Wigmore, *Evidence* § 1420 et seq. (1940); McCormick, *Handbook of the Law of Evidence* 579-751 (1972).

Thus, the depositions were available to the plaintiffs, for purposes of impeachment, if any statements were made at trial that were inconsistent with prior statements given by the same witness. They could be used to refresh the recollection of any witness who claimed at trial he could not remember his earlier statements. They could be used to show what present sense impressions were recorded by a person, e.g., as to the confusion of the McDonnell's recordkeeping department. These would include the exception relating to admissions made in the out-of-court statements contained in the documents obtained by plaintiffs through their own discovery and the discovery of Davis & Cox. The exceptions that allow public records and reports, and

records of regularly conducted activity, to be received at trial would also apply. See *Proposed Rules of Evidence for United States Courts and Magistrates*, Rules 802-803 and Advisory Committee Notes thereto.

If any person who testified at a deposition, or made a statement in any of the documents, were unavailable for the trial, additional exceptions would apply. Id. at Rule 804.

CONCLUSION

For the foregoing reasons the dismissal should be vacated and the plaintiffs should be permitted to have a trial on the merits.

Respectfully submitted,

RABIN & SILVERMAN
Attorneys for Plaintiffs-Appellants
80 Broad Street
New York, New York 10004

I. STEPHEN RABIN
Of Counsel

NOTICE OF ENTRY

Sir:- Please take notice that the within is a *(certified)* true copy of a

duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

RABIN & SILVERMAN

Attorneys for

Office and Post Office Address

80 Broad Street

Borough of Manhattan **New York, N. Y. 10004**

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19

at M.

Dated,

Yours, etc.,

RABIN & SILVERMAN

Attorneys for

Office and Post Office Address

80 Broad Street

Borough of Manhattan **New York, N. Y. 10004**

To

Attorney(s) for

Docket No. 74-2081

Index No. Year 19

UNITED STATES COURT OF APPEA
FOR THE SECOND CIRCUIT

ROBERT L. SCHWARTZ, et al.,

Plaintiffs-Appellan

against

McDONNELL & CO., INCORPORATE
et al.,

Defendants-Appellee

AFFIDAVIT OF SERVICE
BY MAIL

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Attorneys for Plaintiffs-Appellant

Office and Post Office Address, Telephone

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To

Attorney(s) for

Service of a copy of the within

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Dated,

Attorney(s) for

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ed.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------x

ROBERT L. SCHWARTZ, et al.,

Plaintiffs-Appellants,

against

McDONNELL & CO., INCORPORATED, et al.,

Defendants-Appellees.

----------x

Docket No. 74-2081

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

I. STEPHEN RABIN, being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at 5 Mohican Lane, Irvington-On-Hudson, New York, .

On October 18, 1974 deponent served the within Brief upon Milbank Tweed Hadley & McCloy, One Chase Manhattan Plaza, New York, N.Y., Proskauer Rose Goetz & Mendelsohn, 300 Park Avenue, New York, N.Y., Lunney & Crocco, 20 Exchange Place, New York, N.Y., Reavis & McGrath, One Chase Manhattan Plaza, New York, N.Y. and Burns Kennedy Shilling & O'Shea, 598 Madison Avenue, New York, N.Y., attorneys for Defendants-Appellees in this action, by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

I. Stephen Rabin

I. STEPHEN RABIN

Sworn to before me
October 18, 1974

MICHAEL D. DIGIOVANNA
NOTARY PUBLIC, STATE OF NEW YORK
No. 52-6031585
Qualified in Suffolk County
Commission Expires March 30, 1976